Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

HUELL HOWSER, an individual,

Petitioner,

v.

CITY OF LONG BEACH; PORT OF LONG BEACH; CALIFORNIA STATE LANDS COMMISSION; UNITED STATES DEPARTMENT OF THE NAVY; CHINA OCEAN SHIPPING COMPANY TERMINALS AMERICA, INC.; a California corporation; and COSCO AMERICAS, INC., a California corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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62 pp

QUESTIONS PRESENTED

1. Whether a well pled state cause of action satisfies the standing requirements of Article III of the United States Constitution.

2. Whether the adoption of an environmental impact statement and reuse plan which violated the National Environmental Policy Act for failure to consider adequate alternatives, provides standing in federal court for an individual who seeks to preserve historic structures which will be destroyed by the adopted reuse plan.

RULE 29.6 STATEMENT

In compliance with Supreme Court Rule 29.6, Petitioner HUELL HOWSER hereby states that he is an individual. There are no parent companies, no subsidiaries, and no affiliates that have issued shares to the public.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

HUELL HOWSER, an individual,

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v.

CITY OF LONG BEACH; PORT OF LONG BEACH; CALIFORNIA STATE LANDS COMMISSION; UNITED STATES DEPARTMENT OF THE NAVY; CHINA OCEAN SHIPPING COMPANY TERMINALS AMERICA, INC.; a California corporation; and COSCO AMERICAS, INC., a California corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Huell Howser respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals are unreported and are reprinted in the Appendix ("App.") at 21a-29a. The district court's June 15, 1998 order granting Respondents' motions to dismiss (App., *infra*, 17a-20a); and the Ninth Circuit's March 4,

1999 judgment affirming the district court's decision (App., *infra*, 21a-22a) are unreported.

JURISDICTION

The court of appeals entered its judgment on March 4, 1999 (App., *infra*, 21a-22a) and denied a petition for rehearing which was docketed April 22, 1999 (App., *infra*, 28a-29a). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal statutory provisions involved in this case are portions of the Administrative Procedure Act at 5 U.S.C. §§ 702, 704, and 706(2)(A) and (D), portions of the Defense Base Closure and Realignment Act of 1990 at 10 U.S.C. § 2687, portions of the National Environmental Policy Act ("NEPA") at 42 U.S.C. § 4332(2)(C), and 40 C.F.R. § 1502.14. The California statutory provisions involved in this case are the California Code of Civil Procedure ("CCP") section 526a, and the Constitution of the State of California Article XVI Section 6. The California statute and constitutional provision are set forth in the Appendix (App., *infra*, 30a-33a).

STATEMENT

Petitioner originally filed suit against Respondents City of Long Beach, Port of Long Beach (hereinafter collectively "Long Beach"), and California State Lands Commission January 22, 1997 in the Superior Court of Los Angeles County, California, seeking relief pursuant to CCP section 526a, and the Constitution of the State of California Article XVI Section 6.

On April 4, 1997, Petitioner filed an amendment to his original complaint naming the United States Department of the Navy (hereinafter "Navy") as a defendant in place of Doe defendant #1. On April 22, 1997, Petitioner filed a second amendment to his original complaint, this time naming China Ocean Shipping Company Terminals America, Inc. and COSCO Americas, Inc. (hereinafter collectively "COSCO") in place of Doe defendants 2 and 3 respectively. Respondent Navy subsequently removed the case to the district court pursuant to 28 U.S.C. § 1442, on April 25, 1997.

The district court had jurisdiction over the Navy pursuant to 28 U.S.C. § 1331. Original jurisdiction existed pursuant to 28 U.S.C. §1331 on the ground that the Complaint raised allegations concerning violations of the Defense Base Closure and Realignment Act of 1990, 10 U.S.C. § 2687, and the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) which gave rise to causes of action under the Administrative Procedure Act, 5 U.S.C. §§ 702, 704, and 706(2)(A) and (D).

I. The Reuse Of The Long Beach Naval Station And Actions Of Respondents

In 1911, the State of California granted certain tide and submerged lands to Long Beach in trust under Chapter 676, Statutes of 1911 of the California Statutes ("1911 Grant"). The 1911 Grant, and its subsequent amendments, restrict the use of tidelands for the purposes of public parks, commerce, parkways, playgrounds, navigation, and fisheries. The Long Beach Naval Station is located on land previously owned by the City of Long Beach and deeded to the Navy for $1.00 in 1940. In 1963, the

United States government condemned a portion of the tidelands held by Long Beach, including the lands on which were located the Long Beach Naval Station and the Long Beach Naval Shipyard.

In 1991, the Long Beach Naval Station was ordered closed in accordance with the recommendations of the Commission on Naval Base Closures and the Defense Base Closure and Realignment Act of 1990 ("DBCRA"). As the Navy's Local Reuse Authority, Long Beach prepared a reuse evaluation for the Long Beach Naval Station. Long Beach proposed a reuse that would convert the Long Beach Naval Station into a cargo container facility for use by COSCO, a shipping company owned and operated by the government of the People's Republic of China. The reuse required the complete demolition of the Long Beach Naval Station and all its buildings and facilities. In 1993, Long Beach approved the plan.

The Navy's Historical and Architectural Assessment for the Naval Station identified fifteen buildings, structures and facilities on the Long Beach Naval Station as eligible for inclusion on the National Register of Historic Places.

Petitioner is an ex-Marine, journalist and producer of "California's Gold" - a statewide television series in California broadcast on public television. Plaintiff, as a normal part of his profession, regularly visits numerous historical, contemporary, and unique locations in California, including the Long Beach Naval Station. Petitioner visited and produced videos and other newsworthy articles about the Long Beach Naval Station on numerous occasions. Petitioner visited the Long Beach Naval Station on several occasions and conducted interviews with

citizens, Navy officials, City officials, and Port officials. Petitioner also attended a farewell gathering for the Long Beach Naval Station put on by retired military officers. Petitioner videotaped the historic buildings and facilities at the Long Beach Naval Station, which were set for destruction pursuant to Long Beach's "reuse plan". As a result of his involvement, Petitioner became actively involved as a leader in the effort to convince Respondents Long Beach and the Navy to consider reasonable alternatives for the Long Beach Naval Station that would preserve and use the existing historical structures, landscaping, and facilities.

During the DBCRA process the Navy and Long Beach did not study viable and proven alternatives to destruction of the Naval Station. These were the development of the Naval Station as part of the Long Beach Harbor in a manner similar and consistent with the development of the Presidio in San Francisco, and the development of the closed Naval facility in the Port of Charleston, South Carolina. The Navy and Long Beach did not make the Naval Station available to other governmental agencies who wanted such, particularly the United States Marines, as required by the DBCRA. In April 1998, the Navy and Long Beach issued a Joint Final Environmental Impact Statement (under NEPA) and Final Environmental Impact Report ("EIS/EIR"). The Navy studied four alternatives, i.e. a cargo container facility, an auto terminal, an institutional campus, and a "no project alternative". At no point did the Navy or Long Beach study any alternative which would have preserved the buildings, landscaping, and facilities of the Long Beach Naval Station for use by the general public as a historic site.

During the pendency of this litigation the Navy allowed

Long Beach to begin demolition and hazardous waste abatement on the site of the Long Beach Naval Station. Despite Petitioner's repeated attempts to obtain a preliminary injunction pending resolution of the merits of this case, the buildings, landscaping, and facilities of the Long Beach Naval Station have been destroyed.[1]

II. Proceedings Below

Following removal to the district court, Respondents COSCO and the Navy filed motions to dismiss Petitioner's original Complaint on June 12, 1997 and June 19, 1997 respectively. On July 7, 1997, Petitioner filed a motion for leave to amend his original Complaint and concurrently lodged a Proposed First Amended Complaint. On July 28, 1997, the district court granted COSCO and the Navy's motions to dismiss the original complaint and denied Petitioner's motion for leave to amend with regard to the lodged Proposed First Amended Complaint. The dismissal of Petitioner's original Complaint was made without prejudice to Petitioner's filing an amended complaint.

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[1] Petitioner Howser filed a second lawsuit in the California Superior Court, County of Los Angeles, *Howser v. City of Long Beach, et al.* Case No. BC 185 110, after dismissal of the instant case by the district court. This second lawsuit was dismissed by the Los Angeles County Superior Court upon grant of demurrer motions brought by defendants. Such suit is presently being appealed. A third lawsuit was then brought in the Federal District Court for the Central District of California by separate plaintiffs concerning the same causes of action alleged by Petitioner, entitled *Cantrell v. City of Long Beach, et al.* Case No. 98-4835 DDP(AIJx). The dismissal of this suit is presently being appealed. The attempts to stop the destruction of the Long Beach Naval Station brought in these two other lawsuits also fell on deaf ears.

On September 29, 1997, Petitioner filed his First Amended Complaint. On October 24, 1997, Respondents California State Lands Commission, Long Beach, COSCO, and the Navy all filed separate motions to dismiss Petitioner's First Amended Complaint claiming the district court did not have jurisdiction over the subject matter of the suit under Federal Rules of Civil Procedure, Rule 12(b)(1) and for failure to state a claim under Federal Rules of Civil Procedure, Rule 12(b)(6).

The district court granted Respondents' motions to dismiss based on lack of jurisdiction over the subject matter of the case. The district court ruled that Petitioner lacked standing to bring both his Federal claims in Federal Court and his State claims in Federal Court. The district court also ruled that the action was not yet ripe for adjudication in Federal Court.

The court of appeals affirmed the decision of the district court (App., *infra*, 21a-27a) and denied a petition for a rehearing (App, *infra*, 28a-29a).

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit Court Of Appeals' Decision To Affirm The District Court's Dismissal On The Basis Of Lack Of Article III Standing Is Incorrect And Conflicts With The Seventh Circuit's Decision In *FMC Corp. v. Boesky*.

The district court dismissed Petitioner's case based on his alleged inability to satisfy the "injury in fact" prong of the United States Constitution's Article III standing requirement. Though the district court's final order dismissing Petitioner's First Amended

Complaint did not cite specific grounds for Petitioner's lack of standing, the district court's order dismissing Petitioner's original Complaint did state the perceived deficiencies in Petitioner's standing. (App., *infra*, 6a-9a).

The district court's order of July 28, 1997, relied on the "injury in fact" analysis set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130 (1992). (App., *infra*, 7a-8a). The district court's decision rested on the fact that the original Complaint made no allegation that Petitioner had a "legally-protected interest in the buildings at the Long Beach Naval Station, nor that the proposed action to destroy these buildings would affect Plaintiff in a personal and individual way." (App., *infra*, 8a).

The Ninth Circuit Court of Appeals affirmed the district court's decision based solely on Petitioner's inability to satisfy the "injury in fact" prong of Article III standing.[2] (App., *infra*, 24a) Part of the Ninth Circuit's decision rested on the assertion that "for plaintiffs to have standing as a taxpayer in federal court, they must meet the Article III requirements for such standing." (App., *infra*, 26a, citing *Cantrell v. City of Long Beach*, CV 98-4835 DDP(AIJx)). This ruling by the Ninth Circuit is in direct conflict with the Seventh Circuit's holding in *FMC Corp. v. Boesky*, 852 F.2d 981 (7th Cir. 1988).

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[2] Though the district court ruled that Petitioner's action was not ripe for adjudication, (App., *infra*, 19a) the Ninth Circuit did not base its ruling on such and made no mention of the ripeness issue. (App., *infra*, 21a-25a).

A. The Seventh Circuit Was Correct In Determining That Article III Standing Can Arise Out Of Certain Well Plead State Created Causes Of Action

In *FMC Corp.* the Seventh Circuit held that a wrongful misappropriation of a corporation's confidential business information and use of that information to further insider trading, which was a State law cause of action, satisfied the injury requirement under Article III. The Seventh Circuit set forth the legal standard as follows at *FMC Corp. v. Boesky, supra*, 852 F.2d at 993:

> ...As the Supreme Court has stated, standing "often turns on the nature and source of the claim asserted." Warth, 422 U.S. at 500, 95 S.Ct. at 2206. For example, the "actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" Id. The same must also be true of legal rights growing out of state law. If not, federal courts sitting in diversity could not adjudicate some cases involving only state-law breach-of-fiduciary duty claims, which they often do, because some actions for breach of fiduciary duty do not require the plaintiff to show an injury. In such a case, the actual or threatened injury required by Article III exists solely by virtue of the recognized state-law right, the invasion of which creates standing. Properly pleaded violations of state-created legal rights, therefore, must suffice to satisfy Article III's injury requirement. Thus, even in the absence of a specific finding that FMC was injured by the misappropriation of its confidential business information, FMC sufficiently

> alleged the violation of a state-law right that in itself would suffice to satisfy Article III's injury requirement. (Emphasis added).

In the instant case, like *FMC Corp.*, the actual and threatened injury to the Petitioner as a taxpayer exists solely by virtue of the recognized state-law right under CCP section 526a. Therefore, the Seventh Circuit's rationale allowing Article III's "injury in fact" requirement to be satisfied by well plead state law causes of action makes intuitive sense.

Petitioner's First Amended Complaint brought certain state created causes of action against Respondents pursuant to both CCP section 526a and the Constitution of the State of California Article XVI Section 6. (App., *infra*, 30a-33a). Petitioner alleged in his First Amended Complaint that he would be injured as a taxpayer by the Respondents if they were allowed to complete the proposed reuse plan for the Long Beach Naval Station due to waste of the estate, the funds, and the property of the State of California and the City of Long Beach.

CCP section 526a provides taxpayers with standing to sue government entities when such entities illegally spend, waste or injure the estate, funds or other property of that entity. In *Blair v. Pitchess*, 5 Cal.3d 258 (1971) the California Supreme Court took a liberal view of CCP section 526a, stating in relevant part at pages 267 to 268, as follows:

> The primary purpose of [section 526a], originally enacted in 1909, is to "enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing

> requirement." California courts have consistently construed section 526a liberally to achieve this remedial purpose... [W]e have declared that it is "is immaterial that the amount of the illegal expenditures is small or that the illegal procedures actually permit a saving of tax funds." (Citations) Nor have we required that the unlawfully spent funds come from tax revenues; they may be derived from the operation of a public utility or from gas revenues. (Emphasis added).

Petitioner's First Amended Complaint demonstrated that he filed State and Federal tax returns and paid sales and property taxes in the county of Los Angeles, one of the counties affected by the closure of the Long Beach Naval Station. Petitioner's First Amended Complaint was filed on behalf of all taxpayer contributors to the general revenue of the State of California and the County of Los Angeles and the general public pursuant to CCP section 526a. As such, Petitioner satisfied the standing requirements of CCP section 526a as a taxpayer who alleged that the Respondents reuse of the Long Beach Naval Station is causing waste to the estate, the funds and other property of the State of California and the City of Long Beach.

Under the Article III standing rule articulated by the Seventh Circuit, Petitioner clearly satisfies the "injury in fact" requirement of Article III standing pursuant to his taxpayer standing under CCP section 526a.

B. A Conflict Amongst The Circuits Exists On The Issue Of Whether A Well Plead State Cause Of Action Satisfies The Injury Requirement Of Article III Standing

The Article III standing rule articulated by the Seventh Circuit in *FMC Corp.* is in direct conflict with the Article III standing analysis used by the Ninth Circuit in the instant case. This difference in statutory construction amongst the circuits over Article III of the United States Constitution is an issue worthy of resolution by this court. In *McElroy v. United States*, 455 U.S. 642, 102 S.Ct. 1332 (1982)[3] this court stated at page 643, in relevant part, as follows:

> Because of a conflict among the Circuits on this issue of statutory construction, we granted certiorari. (Citation omitted).

Accordingly, based on this court's history of granting writs of certiorari based on conflicts amongst the circuits, it would be appropriate to grant certiorari over the instant case to resolve the existing conflict between the Ninth and the Seventh Circuits.

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[3] In *McElroy* the Petitioner was convicted of violating 18 U.S.C. § 2341, for transporting in interstate commerce forged securities. A conflict existed amongst the circuits as to the issue of whether or not the securities must be forged before being taken across state lines. To settle the conflict in statutory interpretation, this court granted certiorari.

C. A Conflict Over Statutory Construction Of The "Injury In Fact" Prong Of Article III Standing Is Of Great Importance To Federal Jurisprudence At The National Level

To realize the impact and significance of Article III standing requirements in Federal Court, one only needs to review cases subsequent to *Lujan v. Defenders of Wildlife* and observe the number of Federal Court decisions which reference this seminal case on Federal Constitutional standing. Accordingly, any Federal Court decision having a major impact on how the "injury in fact" prong of Article III is interpreted has a resounding effect through the entire Federal Court system.

This court is inclined to grant certiorari when important questions of constitutional law arise. In *Watkins v. United States*, 354 U.S. 178, 77 S.Ct. 1173 (1957)[4] this court stated at 354 U.S. 186 and 187, in relevant part, as follows:

> We granted certiorari because of the very important questions of constitutional law presented. 352 U.S. 822, 77 S.Ct. 62, 1 L.Ed.2d 46.

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[4] In *Watkins* Petitioner was convicted for "contempt of Congress" when he refused to make certain disclosures which he asserted were beyond the authority of the committee to demand. This court granted certiorari because of the questions of constitutional law arising from the case. These questions involved the application of the Bill of Rights to government investigations, the prohibition against compelling witnesses to testify against themselves, the prohibition against unreasonable search and seizure, and the First Amendment freedoms of speech, press, religion, or political belief and association.

Since the conflict between the Ninth Circuit and the Seventh Circuit concerns statutory construction with far-reaching effects on Federal civil procedure, a grant certiorari by this court would comport with this court's tradition of resolving serious and important conflicts amongst circuits over critical issues of Constitutional construction.

II. The Court Of Appeals' Decision To Affirm The District Court's Dismissal On The Basis Of Petitioner's Lack Of Standing Under NEPA Is Incorrect And Improperly Limits Standing Under An Important Federal Statute

NEPA, at 42 U.S.C. § 4332, adopts regulations which agencies of the Federal government are to follow concerning the use and protection of the "human environment." 42 U.S.C. § 4332(2)(C)(iii) provides that all Federal Government agencies shall provide, for any "major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on ... alternatives to the proposed action". Petitioner's First Amended Complaint alleged that the Navy failed to analyze reasonable alternatives in its EIS/EIR on the reuse of the Long Beach Naval Station.

The Ninth Circuit Court of Appeals stated that because Petitioner failed to meet the "injury in fact" requirement of Article III, that he subsequently lacked standing to sue under NEPA stating that "Howser has not 'shown a particularized environmental interest...that will suffer demonstrably increased risk,'Florida Audobon Soc'y v. Bentsen, 94 F.3d 658, 665 (D.C.Cir. 1996), and thus lacks standing under Section 702." (App., *infra* 25a-26a). This ruling ignores previous case law which recognizes a plaintiff's standing to bring suit pursuant to

NEPA due to an "aesthetic injury".

In *Save The Courthouse Committee v. Lynn*, 408 F.Supp. 1323 (S.D.N.Y. 1975)[5] the New York District Court, in an action brought under NEPA, stated at pages 1331 to 1332, in relevant part, as follows:

> The defendants challenge plaintiffs' standing to bring this action asserting that they have not alleged any ownership, economic or special interest in the Courthouse. Recent Supreme Court decisions have established a twofold test for determining whether, in cases of this nature, plaintiffs have standing to sue: first, the person bringing the suit must assert that he has suffered or will suffer "injury in fact" as a result of the alleged illegal federal action; second, the injury must be to an interest arguably within the zone of interests to be protected or regulated by the statutes the Agency is claimed to have violated. *Association of Data Processing Service Org. v. Camp*, 397 U.S. 150, 152-53, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). No longer must the injury be to an economic interest.

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[5] In *Save The Courthouse Committee*, a concerned citizens group brought suit to enjoin the destruction of a courthouse complex with alleged historical value. The citizens group alleged violations of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470 et seq., and the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. The district court granted the citizens group standing since they would suffer an aesthetic injury as a result of the destruction which was to take place in the absence of the procedural safeguards set forth in NHPA and NEPA. The aesthetic injury arose from the fact that the plaintiffs were amongst those who would actually be harmed.

> Injury to aesthetic and environmental interests has been recognized as laying a sufficient foundation for standing so long as the party seeking review is himself among the injured. *Sierra Club v. Morton*, 405 U.S. 727, 734-35, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). (Emphasis added).

In the instant case, Petitioner is a concerned citizen who has used and enjoyed the aesthetic value of the Long Beach Naval Station. As a result, Petitioner is among those who would, and has, suffered an aesthetic injury as a result of the Long Beach Naval Station's proposed and actual destruction.

The district court's decision to deny Petitioner standing because he failed to allege an "injury in fact" that would satisfy Article III, was in error when held to the "injury in fact" standard set forth in *Save The Courthouse Committee*. To deny plaintiffs standing to bring suit under NEPA based on an aesthetic injury detracts from the spirit and meaning of the act. Traditionally, this court has granted certiorari when an important Federal Statute is in question. In *United States v. Ruzicka*, 329 U.S. 287, 67 S.Ct. 207 (1946) this court stated at 329 U.S. 288, in relevant part, as follows:

> We brought this case here, 327 U.S. 776, 66 S.Ct. 964, because it raises questions of importance in the administration of the Agricultural Marketing Agreement Act of 1937. (Citations omitted).

NEPA is a crucial statute in the preservation and protection of the "human environment" as such relates to activities of the Federal Government. To exclude an entire group of plaintiffs who have traditionally been allowed to bring suit under

NEPA will have wide spread ramifications on the utility of the act. Accordingly, this court can now resolve this important issue of Federal Statutory construction by granting certiorari

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV-97-3034-AAH(Ex) Date: July 28, 1997
Title Huell Howser vs. City of Long Beach, et al.

DOCKET ENTRY

PRESENT:
HON. A. ANDREW HAUK, Judge
R. H. MAZZARELLA IRENE NAKAMURA

ATTORNEYS PRESENT FOR PLAINTIFFS:
Richard I. Fine

ATTORNEYS PRESENT FOR DEFENDANTS:
Jefferey M. Oderman
Robert E. Coppola
Alan Hager, Dep. A/G
Eliot F. Krieger, AUSA

PROCEEDINGS: HEARING: Defendants Cosco Terminals, Cosco Americas and U.S. Navy's Motions to Dismiss
Plaintiff's Motion for Leave to Amend Complaint

Court announces tentative ruling and hears oral argument. Court grants the motions to dismiss and denies the motion for

leave to amend with regard to the LODGED proposed amended complaint. Motion to dismiss is granted without prejudice to plaintiff filing an amended complaint other than the proposed amended complaint lodged 7/7/97.

Ex-parte application filed 7/23/97 by Cosco Terminals and Cosco Americas for order extending time to respond to discovery is moot. All discovery is held in abeyance until January 2, 1998.

Plaintiff's amended complaint, if filed, is to be filed not later than September 29, 1997.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HUELL HOWSER,	)CV 97-3034-AAH (Ex)
	)
Plaintiff,	)
	)DECISION AND
v.	)ORDER DISMISSING
	)ORIGINAL
CITY OF LONG BEACH, et al.	)COMPLAINT
	)WITHOUT PREJUDICE
Defendants.	)AND DENYING
	)PLAINTIFF'S MOTION
	)FOR LEAVE TO FILE
	)THE LODGED FIRST
	)AMENDED
	)COMPLAINT

This matter, having come on for hearing before this Honorable Court on July 28, 1997 and the Court, having considered the motions to Dismiss filed by Defendant United States Department of the Navy ("Navy") and Defendants China

Ocean Shipping Co. Terminal America, Inc. and COSCO Americas, Inc. (together "COSCO"), Plaintiff's Motion for Leave to Amend the Complaint, each Opposition to Plaintiff's Motion for Leave to Amend the Complaint filed by Defendants Navy, COSCO, the City of Long Beach ("City") and State Lands Commission, and all Reply Briefs filed in conjunction therewith, as well as the oral arguments made by all parties present at today's hearing on July 28, 1997, hereby GRANTS Defendants Navy and COSCO's Motion to Dismiss the DENIES Plaintiff's Motion for Leave to File the Lodged First Amended Complaint. The Court Makes and Enters this Decision and Order on the grounds that (1) the Original Complaint does not contain sufficient allegations to support Plaintiff's standing to sue, and (2) the litigation is premature and not "ripe" for adjudication.

I. INTRODUCTION

Plaintiff brings this action to enjoin the destruction of

buildings with alleged historical and recreational value located at the now-closed Long Beach Naval Station. In the event that the buildings are destroyed, Plaintiff seeks $50 million in compensatory damages. Plaintiff believes, and upon that basis alleges, that the buildings at the Naval Station will be destroyed pursuant to an alleged agreement between the City and COSCO to lease the property whereon the buildings are situated to COSCO for use as a cargo container facility. Plaintiff claims to bring this action on behalf of "all taxpayer contributors to the general revenue of the State of California in the County of Los Angeles, and the general public."

II. PROCEDURAL STATUS OF THE CASE

Plaintiff brought suit in the Superior Court of the County of Los Angeles on January 22, 1997. On April 3, 1997, Superior Court Judge Abby Soven sustained with prejudice a demurrer by Defendant State Lands Commission as to the Third Cause of

Action for damages. On April 4, 1997, Plaintiff substituted the Navy for Doe Defendant #1 and, on April 21, 1997, substituted COSCO for Doe Defendants #2 and #3. On April 28, 1997, the Navy removed the case to this Federal Court. COSCO filed a Motion to Dismiss on June 12, 1997 and the navy filed a Motion to Dismiss on June 27, 1997. Plaintiff filed a Motion for Leave to Amend Complaint and lodged a proposed First Amended Complaint on July 7, 1997 as well as Oppositions to the Motions to Dismiss on July 14, 1997. Each Defendant filed a separate Opposition to the Motion to Amend the Complaint on July 14, 1997.

III. PLAINTIFF'S STANDING TO SUE

Plaintiff alleges standing to sue as a State and Los Angeles County taxpayer. The Ninth Circuit has held that a plaintiff alleging standing to sue as a state or municipal taxpayer must set forth in the pleadings "the relationship between taxpayer, tax

dollars, and the allegedly illegal government activity." *Hoohuli v. Ariyoshi*, 74 F.2d 1169, 1178 (9th Cir. 1984), citing *Doremus v. Board of Education*, 342 U.S. 429, 433-34 (1952).

Here, Plaintiff's Complaint sets forth no allegations that any State or County taxes are being used by any of the Defendants in this case in conjunction with the proposed project to destroy buildings at the Naval Station.[1] Therefore, the Complaint does not contain sufficient allegations to support Plaintiff's standing to sue as a State or County taxpayer.

Standing also requires the Complaint to allege what the Supreme Court calls "the irreducible constitutional minimum of standing," namely, (1) an "injury in fact," (2) a "causal connection between the injury and the conduct complained of," and (3) "a likelihood that the injury will be redressed by a

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[1] Similarly, Plaintiff's proposed First Amended Complaint which was lodged, but not filed, with the Court on July 7, 1997, also contains no such allegations.

favorable decision." *Lujan v. Defenders* of Wildlife, 504 U.S. 555, 560-61 (1992). The Supreme Court has defined "injury in fact" to mean "an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* By "particularized," the Supreme Court elaborated, "the injury must affect the plaintiff in a personal and individual way." *Id.*

Here, the Complaint contains no allegations that Plaintiff has a legally-protected interest in the buildings at the Long Beach Naval Station, nor that the proposed action to destroy these buildings would affect Plaintiff in a personal and individual way.

In *Lujan*, the Supreme Court dismissed the case for lack of standing because the plaintiffs (environmental scientists) were unable to show they had concrete plans to visit particular foreign countries inhabited by endangered species which plaintiffs sought to protect.

Similarly, here, the Complaint failed to allege that Plaintiff has plans to use the buildings at the Long Beach Naval Station at some specific time in the future.[2] In fact, because the Naval Station is closed to the public, it is entirely speculative that Plaintiff even has access to the Naval Station, let alone specific plans to use the buildings contained thereon.

Therefore, the Court must dismiss the Complaint, and all causes of action contained therein, without prejudice because it does not contain allegations sufficient to support Plaintiff's standing to sue.

IV. RIPENESS

Plaintiff's Original Complaint, and lodged First Amended Complaint, are based upon two important assumptions: (1) that the Navy has made a final decision to transfer the Naval Station to

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[2] The proposed First Amended Complaint also fails to allege that plaintiff has specific plans to use the buildings in the future.

the City, and (2) that the City has made a final decision to destroy the buildings that Plaintiff seeks to protect. However, neither the Navy nor the City have made such decisions, nor is it clear from the facts that these decision are inevitable.

First, for the Navy to transfer the Naval Station to the City, it must (a) issue a Record of Decision to that affect, pursuant to 40 Federal Register § 1505.2, and (b) formally dispose of the property. The Navy has not issued a Record of Decision, nor has it made a formal disposition of the property.

Second, the City has made no decision to destroy any buildings on the Naval Station, nor is it clear from the facts alleged that it would do so if and when the Navy transfers the property to the City.

The Court takes judicial notice of Long Beach Ordinance HD-1732, enacted on April 21, 1997 which contains the following information: on April 4, 1996 the Executive Director of the Long

Beach Harbor Department, acting with authority delegated by the City, entered into a non-binding Statement of Intent with COSCO which proposed that the City would construct a cargo contained facility on the property and grant COSCO a lease to that facility.

On November 4, 1996 the Board of Harbor Commissioners of the City of Long Beach ("Harbor Commission"), acting with authority delegated to the City, enacted City Ordinance HD-1719 which entered the City into a Preferential Assignment Agreement (the "lease") with COSCO for the use of property at the Long Beach Naval Station as a cargo container terminal.

However, on April 21, 1997, the Harbor Commission enacted City Ordinance HD-1732 which (1) vacated HD-1719, thereby automatically repealing the lease with COSCO, and (2) disapproved the Statement of Intent.

So far as the Court is able to determine, the City has taken

no action since that time to reaffirm the lease with COSCO or otherwise indicate an intention to either lease the property to COSCO or destroy the buildings that Plaintiff seeks to protect.

The Ninth Circuit has held that a "federal court normally ought not resolve issues involving 'contingent future events that may not occur as anticipated, or indeed may not occur at all,'" *Clinton v. Acequia*, Inc., 94 F.3d 568, 572 (9th Cir. 1996), quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985). Particularly in land use cases, as is the case at bar, the Supreme Court has stated: "Our cases uniformly reflect an insistence on knowing the nature and extent of permitting development" before adjudicating the legality of a development project. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1985).

Here, it is entirely speculative whether the buildings Plaintiff seeks to protect will be destroyed because (1) the Navy

has not transferred the Naval Station to the City and (2) the City has not decided, nor indicated its intention, to destroy the buildings at the Naval Station. Therefore, the Complaint is premature and not "ripe" for adjudication.

V. PLAINTIFF'S MOTION FOR LEAVE TO AMEND THE COMPLAINT

Plaintiff has moved the Court for leave to amend the Complaint based upon his assumption that the proposed First Amended Complaint will cure the deficiencies of the originally filed Complaint. However, as explained above, even the proposed First Amended Complaint does not contain sufficient allegations to support Plaintiff's standing to sue. Nor is it apparent to the Court that there is any allegation that can be made that would make the case "ripe" for adjudication at this time.

Therefore, Plaintiff's Motion for Leave to file the lodged First Amended Complaint is hereby DENIED. The Court,

however, will permit the Complaint to be amended if and when Plaintiff is able to allege sufficient facts to support his standing to sue, and if and when it is clear that Plaintiff can properly allege the necessary facts that clearly support the "ripeness" of this litigation.

The Original Complaint, and all causes of action contained therein, are hereby DISMISSED without prejudice.

IT IS SO ORDERED.

DATED: 7/28/97

Signed

The Honorable A. Andrew Hauk,
Senior United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV-97-3034-AAH(EEx) Date: January 12, 1998
Title Huell Howser vs. City of Long Beach, et al.

DOCKET ENTRY

PRESENT:
HON. A. ANDREW HAUK, Judge

R.H. MAZZARELLA	LENA VILLEGAS
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
Richard I. Fine	Jefferey M. Oderman Robert E. Coppola Alan Hager, Dep. A/G Eliot F. Krieger, AUSA

PROCEEDINGS: HEARING: Defendants City of Long Beach and Port of Long Beach's Motion to Dismiss
Defendants COSCO Terminals and COSCO Americas' Motion to Dismiss and Joinder in Long Beach's Motion
Defendant U.S. Navy's Motion to Dismiss

Defendant State of California Land
Commission's Motion to Dismiss

Court hears oral argument and grants the motions and orders the action dismissed in this court with prejudice, but, without prejudice to refiling in the state court.
See formal order.
Court further orders that in the event of an appeal the appellant shall furnish the transcript of todays proceedings as part of the record on appeal and said transcript shall constitute the court's findings of fact and conclusions of law. Said transcript shall be incorporated into the formal order by reference.

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HUELL HOWSER, Plaintiff, v. CITY OF LONG BEACH, PORT OF LONG BEACH, CALIFORNIA STATE LANDS COMMISSION, U.S. DEPARTMENT OF THE NAVY, CHINA OCEAN SHIPPING COMPANY TERMINALS AMERICA INC., COSCO AMERICAS, INC. and DOES 4 TO 50, Defendants.	CV 97-3034-AAH (Ex) ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS FOR LACK OF STANDING AND RIPENESS

This matter came before the Court for hearing on January 12, 1998. Motions to dismiss Plaintiff's First Amended Complaint have been brought by each of the defendants, namely

the City of Long Beach and the Port of Long Beach, the California State Lands Commission, the United States Department of the Navy, the China Ocean Shipping Company Terminals America, Inc., and COSCO Americas, Inc. Having considered the defendants' Motion papers, the plaintiff's Opposition papers, and the defendants' Replies to the Opposition papers, as well as the arguments advanced at the hearing,

The defendants' motions to dismiss are granted with prejudice as to any further filing in this court, but without prejudice to filing a new action in state court.

This is plaintiff's second attempt to amend his Original Complaint. His first attempt was set forth in his Proposed First Amended Complaint, which was rejected by this Court's July 28, 1997 Order, which also dismissed his Original Complaint, without prejudice, on the grounds set out therein. His second attempt is now before the Court as his actual First Amended Complaint,

filed September 29, 1997. He has not cured the defects outlined in this Court's July 28, 1997 Order. The First Amended Complaint is therefore dismissed on the following grounds:

(1) Plaintiff Has No Standing to Sue in Federal Court.

Plaintiff's allegations demonstrate that he lacks standing to bring his Federal claims in Federal Court, and also lacks standing to bring his State claims in Federal Court. This court need not decide whether plaintiff will be able to set forth allegations sufficient to meet the requirements for standing to assert his State claims in State Court.

(2) Plaintiff's Action is Not Ripe for Adjudication in Federal Court.

Plaintiff's allegations are not sufficient to show that his action is ripe for adjudication in Federal Court. Again, this court need not decide whether plaintiff's action is ripe for adjudication in State Court

Any applicable limitations, whether statutory, legal, or equitable, shall be available upon plaintiff's filing in State Court.

In the event of any appeal of this order, if there appears to be a necessity for findings of fact, conclusions of law and additional reasons for this order, the same will appear in the transcript, which can be prepared and filed herein, and the appellant will designate the transcript as part of the record on appeal. This Court hereby incorporates herein by this reference the findings of fact and conclusions of law contained in said transcript.

The clerk of court is hereby directed to serve copies of this order upon all counsel of record herein.

IT IS SO ORDERED.

DATED: 1/15/98

Signed

The Honorable A. Andrew Hauk,
United States District Judge

APPENDIX E

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-55351
CT/AG#: CV-97-03034-AAH(Ex)

HUELL HOWSER, an individual
Plaintiff - Appellant

v.

CITY OF LONG BEACH; PORT OF LONG BEACH; CALIFORNIA STATE LAND COMMISSION; UNITED STATES DEPARTMENT OF THE NAVY; CHINA OCEAN SHIPPING COMPANY TERMINALS AMERICA, INC. a California corporation; COSCO AMERICAS, INC. a California corporation
Defendants - Appellees

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered March 4, 1999

APPENDIX F

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

	) NO. 98-55351
HUELL HOWSER,	)
	) D.C.NO.CV-97-03034-
Plaintiff-Appellant,	) AAH(Ex)
	)
v.	) MEMORANDUM[1]
	)
CITY OF LONG BEACH, PORT OF LONG BEACH, CALIFORNIA STATE LANDS COMMISSION, U.S. DEPARTMENT OF THE NAVY, CHINA OCEAN SHIPPING COMPANY TERMINALS AMERICA INC., a California Corporation; COSCO AMERICAS, INC. a California corporation, and DOES 4 TO 50,	)
	)
Defendants-Appellees.	)
	)
	)

[1] This disposition is not appropriate for publication ad may not be cited to or by the courts of this Circuit except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Central District of California
A. Andrew Hauk, District Judge, Presiding

Submitted February 2, 1999[2]
Pasadena, California

Before: D.W. NELSON, KOZINSKI, and TROTT, Circuit Judges.

We affirm the district court because appellant Howser has not proven that he suffered a "Concrete and particularized" and "'actual and imminent'" harm as required for Article III standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (citations omitted).

Howser's claims of personal injury fail because he does not indicate that he ever used the Naval Station's facilities previously, other than to interview and meet with officers regarding closure, and he does not assert sufficiently concrete

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[2] The panel unanimously finds this case suitable for decision without oral argument. Fed.R.App.P.34(a)(2).

plans to use them in the future. His situation is quite different from that of the petitioner in Knowles v. United States Coast Guard, 924 F.Supp. 593 (S.D.N.Y. 1996), who visited the Coast Guard base at Governor's Island regularly for recreational purposes and had specific plans to return. See id. at 600-01. Howser's "'some day' intentions--without any description of concrete plans, or indeed any specification of when the some day will be--do not support a finding of 'actual or immiinent' injury that our cases require." Lujan, 504 U.S. at 564.

Because Howser has failed to prove sufficient injury, he also lacks standing to bring an action under NEPA. Section 702 of the Administrative Procedure Act, 5 U.S.CA. § 702, does not lower the Article III threshold. See Valley Forge Christian College v. Americans United for Separation of church and State, Inc., 454 U.S. 464, 487 n.24 (1982). Howser has not "shown a particularized environmental interest ... that will suffer

demonstrably increased risk," Florida Audobon Soc'y v. Bentsen, 94 F.3d 658,665 (D.C.Cir. 1996), and thus lacks standing under Section 702.

Finally, Howser claims that the state law right to sue created by Section 526a gives him a basis for standing under Article III. We agree with the district court in the related case Cantrell v. City of Long Beach, CV 98-4835 DDP (AIJx) (C.D.Cal.Dec. 7, 1998), that for plaintiffs to have standing as a taxpayer in federal court, they must meet the Article III requirements for such standing. See Cantrell, CV 98-4834 DDP (AIJx), at 14. Although the Seventh Circuit indicated in FMC Corp. v. Boesky, 852 F.2d 981 (7th Cir. 1988), that violations of state law rights can create the basis for Article III standing without other injury, see id. at 993, we need not reach that issue. Boesky involved state law breach of fiduciary duty claims and an actual injury, whereas Howser's only state law right is a

procedural one to bring a taxpayer's claim. Howser must therefore demonstrate the "relationship between taxpayer, tax dollars, and the allegedly illegal government activity." Hoohuli v. Ariyoshi, 741 F.2d 1169, 1178 (9th Cir. 1984). Because Howser, like the plaintiffs in Cantrell, "make[s] conclusory allegations as to the misuse of tax dollars and only clearly allege[s] misuse of certain tidelands trust assets and funds belonging to the Port of Long Beach," he lacks taxpayer standing. Cantrell, CV 98-4835 DDP (AIJx), at 15-16.

AFFIRMED.

APPENDIX G

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUELL HOWSER,	) NO. 98-55351
Plaintiff-Appellant,	) D.C.NO.CV-97-03034-AAH(Ex)
v.	) ORDER
CITY OF LONG BEACH, PORT OF LONG BEACH, CALIFORNIA STATE LANDS COMMISSION, U.S. DEPARTMENT OF THE NAVY, CHINA OCEAN SHIPPING COMPANY TERMINALS AMERICA INC., a California Corporation; COSCO AMERICAS, INC. a California corporation, and DOES 4 TO 50,	) FILED) APR 22 1999) CATHY A GUTTERSON, CLERK U.S. COURT OF APPEALS) DOCKETED
Defendants-Appellees.	)

Before: D.W.NELSON, KOZINSKI, and TROTT, Circuit Judges.

The panel has voted to deny appellant's petition for

rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge requested a vote on whether to rehear the matter en banc. Fed.R.App. P. 35.

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.

APPENDIX H

California Code of Civil Procedure Section 526a

§ 526a. Actions against officers; scope of section; municipal bonds

An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer; provided, that no injunction shall be granted restraining the offering for sale, sale, or issuance of any municipal bonds for public improvements or public utilities.

An action brought pursuant to this section to enjoin a public improvement project shall take special precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law.

Constitution of the State of California Article XVI Section 6

§ 6. Public credit or funds; loan or gift; public ownership of corporate stock; veterans aid; transfer of funds

Sec. 6. The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State, or of any county, city and county, city, township or other political corporation or subdivision of the State now existing, or that may be hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of Article XVI; and it shall not have power to authorize the State, or any political subdivision thereof, to subscribe for stock, or to become a stockholder in any corporation whatever; provided, further, that irrigation districts for the purpose of acquiring the control of any entire international water system necessary for its use and purposes, a part of which is situated in the United States, and a part thereof in a foreign country, may in the manner authorized by law, acquire the stock of any foreign corporation which is the owner of, or which holds the title to the irrigation districts for the purpose of acquiring water and water rights and other property necessary for their uses and purposes, may acquire and hold the stock of corporations, domestic or foreign, owning waters, water rights, canals, waterworks, franchises or concessions subject to the same obligations and liabilities as are imposed by law upon all

other stockholders in such corporations; and

Provided, further, that this section shall not prohibit any county, city and county, city, township, or other political corporation or subdivision of the State from joining with other such agencies in providing for the payment of workers' compensation, unemployment compensation, tort liability, or public liability losses incurred by such agencies, by entry into an insurance pooling arrangement under a joint exercise of powers agreement, or by membership in such publicly-owned nonprofit corporation or other public agency as may be authorized by the Legislature; and

Provided, further, that nothing contained in this Constitution shall prohibit the use of State money or credit, in aiding veterans who served in the military or naval service of the United States during the time of war, in the acquisition of, or payments for, (1) farms or homes, or in projects of land settlement or in the development of such farms or homes or land settlement projects for the benefit of such veterans, or (2) any business, land or any interest therein, buildings, supplies, equipment, machinery, or tools, to be used by the veteran in pursuing a gainful occupation; and

Provided, further, that nothing contained in this Constitution shall prohibit the State, or any county, city and county, city, township, or other political corporation or subdivision of the State from providing aid or assistance to persons, if found to be in the public interest, for the purpose of clearing debris, natural materials, and wreckage from privately owned lands and waters deposited thereon or therein during a period of a major disaster or emergency, in either case declared by the President. In such case, the public entity shall be indemnified by the recipient from the award of any claim against the public entity arising from the rendering of such aid or

assistance. Such aid or assistance must be eligible for federal reimbursement for the cost thereof.

And provided, still further, that notwithstanding the restrictions contained in this Constitution, the treasurer of any city, county, or city and county shall have as may be necessary to provide funds for meeting the obligations incurred for maintenance purposes by any city, county, city and county, district, or other political subdivision whose funds are in custody and are paid out solely through the treasurer's office. Such temporary transfer of funds to any political subdivision shall be made only upon resolution adopted by the governing body of the city, county, or city and county directing the treasurer of such city, county, or city and county to make such temporary transfer. Such temporary transfer of funds to any political subdivision shall not exceed 85 percent of the anticipated revenues accruing to such political subdivision, shall not be made prior to the first day of the fiscal year nor after the last Monday in April of the current fiscal year, and shall be replaced from the revenues accruing to such political subdivision before any other obligation of such political subdivision is met from such revenue.